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No. 05-8820

In The
Supreme Court of the United States
October Term, 2006

GARY LAWRENCE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED (RESTATED)

I. Under 28 U.S.C. § 2244(d)(2) of the Antiterrorism and Effective Death Penalty Act (AEDPA), is the period of limitations tolled during the time in which a petition for writ of certiorari may be filed following denial of state postconviction relief?

II. Does lack of knowledge of the AEDPA limitations period constitute an "extraordinary circumstance" entitling a habeas petitioner to equitable tolling?

III. Does an error by state appointed counsel as to the AEDPA limitations period constitute an "extraordinary circumstance" entitling a habeas petitioner to equitable tolling?

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STATEMENT OF THE CASE

Petitioner, Gary Lawrence, was convicted by a Florida jury of first-degree murder, conspiracy to commit murder, auto theft, and petty theft, and a Florida trial court sentenced him to death.[1] The Florida Supreme Court affirmed Petitioner's conviction and sentence on direct appeal, *Lawrence v. State*, 698 So. 2d 1219 (Fla. 1997), and this Court denied certiorari on January 20, 1998. *Lawrence v. Florida*, 522 U.S. 1080 (1998).

On January 19, 1999, 364 days later, Petitioner filed an application for state post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.851. After the trial court denied Petitioner's motion, he filed a state petition for writ of habeas corpus with the Florida Supreme Court. The Florida Supreme Court affirmed the denial of Petitioner's motion for post-conviction relief and denied his petition for habeas corpus on October 17, 2002. *Lawrence v. State*, 831 So. 2d 121 (Fla. 2002). Petitioner did not move for rehearing and the Florida Supreme Court issued its mandate on November 18, 2002.

Even though Petitioner's state post-conviction claims were fully exhausted on November 18, 2002, he did not file a federal habeas petition until March 11, 2003, 144 days after the Florida Supreme Court's opinion was issued, and, based on then settled case law, 113 days after the deadline. Instead, Petitioner filed a certiorari petition in this Court on January 9, 2003. Petitioner's federal habeas petition raised the same arguments that were raised in his motion for state post-conviction relief. *Compare* J.A. 24-27 *with* J.A. 31-34; *compare* J.A. 28 *with* J.A. 35; and *compare* J.A. 28 *with* J.A. 37.[2] The State argued in response that

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[1] The facts of Petitioner's heinous crimes are summarized by the Eleventh Circuit in *Lawrence v. Florida*, 421 F.3d 1221, 1222-23 (11th Cir. 2005). J.A. 112-14.

[2] Appointed counsel subsequently filed an amended habeas petition raising claims not raised in the initial habeas petition. J.A. 41-54.

the habeas petition should be dismissed as untimely and that equitable tolling should not apply. J.A. 55-77. Petitioner then claimed a circuit split had developed on the question of whether a petition for certiorari to the U.S. Supreme Court following the denial of state post-conviction relief tolls the limitation period. J.A. 78-91. Petitioner also sought to invoke the doctrine of equitable tolling on the grounds that (1) counsel who advised him of the timing of his petition was selected by and pre-qualified by the State of Florida under its registry statute; (2) his mental abilities prevented him from meaningfully participating in a relationship with his counsel; and (3) he had a facially strong constitutional claim. J.A. 114.

The district court dismissed the petition as untimely, but granted a certificate of appealability ("COA") to address "whether the one-year limitations period applicable to a petition for writ of habeas corpus under 28 U.S.C. § 2254 barred [Petitioner's] petition, and . . . whether the statute of limitations is tolled during the pendency of a petition for writ of certiorari in the United States Supreme Court challenging the state court's denial of petitioner's earlier motion for state collateral review." J.A. 109. The Eleventh Circuit affirmed, holding that a COA should not have been granted on the one-year limitations question because it had previously held "[t]he time during which a petition for writ of certiorari is pending, or could have been filed, following the denial of collateral relief in the state courts, is not to be subtracted from the running of time for 28 U.S.C. § 2244(d)(1) statute of limitations purposes." J.A. 118. The court further held equitable tolling did not apply. J.A. 120.

SUMMARY OF ARGUMENT

AEDPA is structured to ensure habeas litigants first exhaust all state remedies and then promptly file their federal habeas petitions. The plain language of § 2244(d)(2) accomplishes this result by tolling AEDPA's limitations period only until state court remedies are exhausted. Tolling applies only while state post-conviction proceedings are pending in state court. Certiorari petitions seeking review of state post-conviction decisions are simply not an integral part, nor any part, of the state process. Once state post-conviction proceedings have been completed in state court, a habeas petitioner is free to file, and consonant with AEDPA's mandate to expedite the post-conviction process should file, any federal habeas claims. Petitioner's construction not only contravenes this mandate, but also encourages the filing of frivolous certiorari petitions for the sole purpose of tolling the limitations period.

At the time Petitioner's habeas petition was due, the Eleventh Circuit, and every other circuit court to have addressed the issue, agreed AEDPA's limitations period was not tolled during the time in which a certiorari petition from a denial of state post-conviction relief could be filed. Petitioner's ignorance of this settled law does not amount to an extraordinary circumstance beyond his control and unavoidable even with diligence. Therefore, to the extent equitable tolling applies to the AEDPA period of limitations, it is not proper in this case.

Petitioner's claims of attorney error in the habeas process are essentially claims of ineffective assistance of post-conviction counsel, claims not cognizable in a federal habeas proceeding. Given same, these claims cannot constitute an extraordinary circumstance warranting equitable tolling of the AEDPA limitations period. Moreover, Courts have held routinely that negligence or misadvice by counsel does not warrant equitable tolling. Also, since there is no constitutional right to post-conviction counsel, and the state had no duty to appoint counsel for Petitioner, acceptance of Petitioner's argument would punish

Florida and other states for choosing to provide such counsel. Finally, Petitioner's allegations regarding the disorganization of Florida's registry counsel program are irrelevant, as any alleged disorganization did not cause Petitioner to file his habeas petition late. Once the Florida Supreme Court issued its decision affirming the denial of state post-conviction relief, thirty days passed until the Court issued its mandate, and thirty-one days passed until Petitioner's habeas petition was time-barred. If Petitioner had exercised due diligence, he could easily have timely filed his habeas petition, particularly since his petition raised the same claims previously presented in his state proceedings.

ARGUMENT

I. THE AEDPA LIMITATIONS PERIOD IS NOT TOLLED DURING THE TIME IN WHICH A CERTIORARI PETITION MAY BE FILED FOLLOWING DENIAL OF STATE POST-CONVICTION RELIEF

The AEDPA limitations period begins to run when a conviction becomes final, and is tolled only during the pendency of an "application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). As ten of the eleven circuits to consider this issue have held, the time during which certiorari may be sought after a final state court denial of post-conviction relief is not tolled under § 2244(d)(2).[3]

A. The plain language of § 2244(d)(2) tolls the limitations period only until state court remedies are exhausted.

Section 2244(d)(2) specifies that the statute of limitations is tolled only during the period in which "a properly filed application for State post-conviction or other collateral review

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[3] *See David v. Hall*, 318 F.3d 343, 345 (1st Cir.), *cert. denied*, 540 U.S. 815 (2003); *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002); *Crawley v. Catoe*, 257 F.3d 395, 401 (4th Cir. 2001), *cert. denied*, 534 U.S. 1080 (2002); *Miller v. Dragovich*, 311 F.3d 574, 576 (3d Cir. 2002), *cert. denied* 540 U.S. 859 (2003); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir.), *cert. denied*, 532 U.S. 998 (2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000), *cert. denied*, 532 U.S. 950 (2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *cert. denied*, 531 U.S. 1166 (2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 592 U.S. 1099 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000); *but see Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004).

with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). A petition for certiorari is simply not an "application for State post conviction" relief nor for "other [State] collateral review." Thus, under the plain language of the statute, an application for state post-conviction review cannot be considered pending after *state* avenues for appeal have been exhausted.

The AEDPA limitations period is tolled under § 2244(d)(2) only until state remedies actually are exhausted. "[E]xhaustion does not include seeking certiorari from the state court's denial of post-conviction relief." *Fay v. Noia*, 372 U.S. 391, 435-38 (1963); *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 149 n.7 (1979). In a Florida capital case, once the Florida Supreme Court has denied post-conviction relief, there are no other state avenues for appeal and state remedies have been exhausted. Contrary to Petitioner's argument, certiorari review of State post-conviction proceedings is not "an integral final step." Pet. Br. at 17; *see Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999) ("Exhaustion of state remedies . . . does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court."). Indeed once state post-conviction proceedings have been completed in state court, a habeas petitioner is free to file, and consonant with AEDPA's mandate to expedite the post-conviction process should file, any federal habeas claims. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan v. Walker*, 533 U.S. 167, 181 (2001).

In *Duncan*, this Court considered whether the filing of a federal habeas petition constitutes "other collateral review" under § 2244(d)(2). The Court concluded the word "State" in

"State post-conviction or other collateral review" modified both "post-conviction" and "other collateral review." The Court then held that a federal habeas petition is not an "application for State post-conviction or other collateral review" within the meaning of § 2244(d)(2), and does not toll the period of limitations. *Duncan*, 533 U.S. at 181.

One year later, in *Carey v. Saffold*, 536 U.S. 214 (2002), this Court considered whether an application for State post-conviction relief remained "pending" within the meaning of § 2244(d)(2) during periods in a State's post-conviction process in which a criminal defendant's application for relief was momentarily not under court consideration. *Id.* at 217. Answering the question in the affirmative, the Court held the application remains "pending" for § 2244(d)(2) purposes "until the application has achieved final resolution through the *State's* post-conviction procedures." *Id.* at 220 (emphasis added). The Court explained in *Carey* that the ordinary meaning of "pending" is "in continuance" or "not yet decided" when used as an adjective, and "through the period of continuance . . . of" or "until the . . . completion of" when used as a preposition. *Id.* at 219-220. The Court held that an application under § 2244(d)(2), is pending "as long as the ordinary state collateral review process is 'in continuance'--i.e., 'until the completion of' that process. In other words, until the application has achieved final resolution through the *State's* post-conviction procedures, by definition it remains 'pending.'" *Id.* at 219-20 (emphasis added).

Duncan and *Carey* thus compel the conclusion that the AEDPA limitations period is tolled under § 2244(d)(2) only until final resolution has been achieved through the *State's* post-conviction procedures (i.e., such time as *state* avenues for appeal have been exhausted), and tolling does not extend to the filing of certiorari petitions.[4]

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[4] Lawrence argues that no distinction can be drawn for tolling purposes between cases where a certiorari petition is timely filed and cases where a

Much of Petitioner's argument hinges on both the language of § 2244(d)(1)(A) and this Court's construction of that language. Under that section, AEDPA's one year period of limitation begins to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). The courts of appeals have interpreted the phrase "final by the conclusion of direct review" to include an opportunity to seek certiorari from this Court. *Clay v. United States*, 537 U.S. 522, 528 (2003). As the Tenth Circuit recognized in *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999), "[i]t would not be in the interest of judicial efficiency to require a prisoner to begin post-conviction proceedings before his judgment of conviction was final, and that is why the relevant statutes hinge the running of the limitation period on the finality of the judgment of conviction. . .."

However, the question of when a conviction becomes final so as to start the running of the statute of limitations under § 2244(d)(1)(A), is fundamentally different from the question of when the statute of limitations is tolled under § 2244(d)(2). *See White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002). Sections (d)(1)(A) and (d)(2) contain different language and effect different purposes. "Unlike § 2244(d)(1)(A), which uses the phrase 'became final by . . . expiration of the time for seeking [direct] . . . review,' a phrase that . . . takes into account certiorari proceedings, § 2244(d)(2) contains no such language." *Stokes v. Dist. Attorney*, 247 F.3d 539, 542 (3d Cir. 2001). Instead, this language is consistent with the § 2254 requirement that a state prisoner exhaust state remedies prior to filing a federal habeas petition. *See* 28 U.S.C. § 2254 (b)(1)(A); *Serrano v. Williams*, 383 F.3d 1181, 1184 (10th Cir. 2004) ("In our decisions, we have construed the pendency of a state post-

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certiorari petition is not timely filed. Pet. Br. at 18-19. Whether a distinction could be drawn in such cases in light of this Court's holdings in *Carey* and *Evans v. Chavis*, 126 S. Ct. 846 (2006), however, is not before this Court, as Lawrence timely filed his certiorari petition.

conviction application as encompassing all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies.").

The textual distinctions between § 2244(d)(1)(A) and § 2244(d)(2) suggest that Congress did not intend section 2244(d)(2) tolling to apply to potential Supreme Court review. Congress knew how to include the certiorari period in a statutory timeframe, as it did so in § 2244(d)(1)(a). By omitting such language from § 2244(d)(2), Congress excluded potential Supreme Court review as a basis for tolling the one year limitations period. *See Duncan*, 533 U.S. at 174 ("'It is well settled that 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997)); *see also*, *Crawley v. Catoe*, 257 F.3d 395, 400 (4th Cir. 2001) ("The very difference of wording in the two code sections indicates that they do not mean the same and is an indication that § 2244(d)(2) refers only to the state proceedings rather than to federal proceedings also."); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001) ("unlike § 2244(d)(1)(A), which uses the phrase 'became final by ... expiration of the time for seeking [direct] ... review,' a phrase that . . . takes into account certiorari proceedings, § 2244(d)(2) contains no such language."); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999)("tolling provision in § 2244(d)(2) is distinguishable from § 2244(d)(1)(A)").

Congress's intent to synchronize the tolling period with the § 2254(b)(1)(a) exhaustion requirement is also demonstrated by the language of § 2263(b)(2), the opt in statute's counterpart to § 2244(d)(2). While the language used by Congress in § 2263(b)(2) is more specific than that in § 2244(d)(2), these sections accomplish the same purpose: tolling the limitations period until state remedies are exhausted as required by § 2254.

Congress did not demonstrate a "clear intent to unmoor the limitations provisions from exhaustion requirements," as alleged by Petitioner. Pet. Br. at 21. The Violent Crime Control and Law Enforcement Improvement Act of 1995, introduced by Senator Dole, did not contain a tolling provision, but instead provided that the one year limitations period begins to run on "the date on which state remedies are exhausted." S. 3, 104th Cong. § 508 (1995). The subsequently introduced Habeas Corpus Reform Act of 1995, which contains the current § 2244(d) language, provided that the limitations period begins to run upon conclusion of direct review, but also added the § 2244(d)(2) tolling provision during such time as state remedies are being exhausted. 141 Cong. Rec. S4592 (daily ed. Mar. 24, 1995). The result of this change in language is to ensure that state prisoners begin to exhaust their state remedies as soon as possible. *See Kapral v. United States*, 166 F.3d 565, 580-81 (3d Cir. 1999) (Alito, J., concurring) ("it is reasonable to infer that the reason for the new approach taken in S.623 was to force state prisoners, upon the completion of direct review, promptly to commence either a state post-conviction relief proceeding (which would toll the limitation period) or a federal habeas proceeding.") Thus, the current language of the AEDPA is still tied to state exhaustion and differs from that in the Violent Crime Control and Law Enforcement Improvement Act of 1995 only to the extent that it eliminates the ability of state prisoners to delay exhaustion of their state remedies.

B. Section 2244(d)(2) effectuates AEDPA's fundamental purposes.

Requiring habeas petitioners to seek federal relief promptly following exhaustion of State post-conviction remedies fulfills AEDPA's goal to further the interests of finality and comity. Section 2244(d)(2) achieve this goal by tolling the limitations period only while State post-conviction remedies are pursued and exhausted. *Snow*, 238 F.3d at 1036 ("[T]his result comports

with the requirement that a state prisoner exhaust state remedies before filing a federal habeas petition."). Prior to AEDPA's passage there was no statute of limitations governing federal habeas petitions. Consequently, state prisoners, particularly those sentenced to death, had a tremendous incentive to delay filing their habeas petitions. *See McCleskey v. Zant*, 499 U.S. 467, 491-92 (1991); *see also, e.g.*, Report on Habeas Corpus in Capital Cases, 45 Crim. L. Rep. (BNP) 3239, 3240 (1989) ("litigation of constitutional claims often comes only when prompted by the setting of an execution date"); 142 Cong Rec H3605, H3606 (1996) (statement of Rep. Hyde) (describing then-ubiquitous delays in habeas proceedings in capital cases as "ridiculous"); 142 Cong. Rec. S3454, S3471-72 (1996) (statement of Sen. Specter) (describing delays inherent in the pre-AEDPA habeas statutory scheme). "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases," and to further the principles of comity, finality, and federalism. *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *see also Williams v. Taylor*, 529 U.S. 362, 386 (2000) (Stevens, J.) ("Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law"); *Mayle v. Felix*, 125 S. Ct. 2562, 2573 (2005) ("Congress enacted AEDPA to advance the finality of criminal convictions."). As this Court has recognized, AEDPA's statutory framework is structured to expedite the postconviction process. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants first to exhaust all state remedies and then to file their federal habeas petitions as soon as possible." *Duncan*, 533 U.S. at 181.

Finality

By establishing strict deadlines for filing federal habeas petitions, AEDPA furthers the interests of finality. "[F]inality is essential to both the retributive and the deterrent functions of criminal law." *Calderon v. Thompson*, 523 U.S. 538, 555 (1998); *see also Teague v. Lane*, 489 U.S. 288, 309 (1989) (plurality opinion) ("Without finality, the criminal law is deprived of much of its deterrent effect."). [5] This is particularly true in the death penalty context, where, as the Eleventh Circuit noted, "[e]ach delay, for its span, is a commutation of a death sentence to one of imprisonment." *Lawrence*, 421 F.3d at 1225.

This Court has recognized the purpose of § 2244(d)(1) was to reform and streamline the habeas process, "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179. The limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments," *id.*, and through it, the derivative, equally well-recognized interests in comity and federalism. *See Acosta v. Artuz*, 221 F.3d 117, 123 (2d Cir. 2000) ("The AEDPA statute of limitation promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time.").

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[5] In addition, commentators have noted that the more prolonged the review process, the greater the risk that the passage of time will preclude any retrial of the defendant and will "reward the accused with complete freedom from prosecution." "[F]ederal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights." *Engle*, 456 U.S. at 128; *see also In re Blodgett*, 502 U.S. 236, 239 (1992) ("None of the reasons offered in the response dispels our concern that the State of Washington has sustained severe prejudice by the 2 1/2-year stay of execution.").

Lack of finality has heightened significance in the context of habeas petitions filed under § 2254 because such petitions implicate comity and federalism concerns. *See McCleskey*, 499 U.S. at 491; *Engle v. Isaac*, 456 U.S. 107, 134 (1982). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of a State to pass laws means little if the State cannot enforce them." *Calderon*, 523 U.S. at 556 (quoting *McClesky*, 499 U.S. at 491). Liberal allowance of habeas diminishes the significance of state trial court proceedings, *see Brecht v. Abrahamson*, 507 U S. 619, 635 (1993); *Engle*, 456 U.S. at 127, encourages petitioners to relitigate claims on collateral review, *Brecht*, 507 U.S. at 635, and even arguably erodes the quality of state court judging and the morale of state judiciaries, *see Calderon*, 523 U.S. at 555 ("There is perhaps nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else.") (internal quotation omitted); *Engle*, 456 U.S. at 128 n.33. Thus, "[i]ndiscriminate federal intrusions may simply diminish the fervor of state judges to root out constitutional errors on their own." *Id.*

Comity

Coextensive with AEDPA's finality interest is its comity interest. One of the animating principles of habeas corpus jurisprudence is that state courts should have the first opportunity to hear inmates' claims that their convictions should be overturned. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991); *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see also Rose v. Lundy*, 455 U.S. 509, 518-519 (1982) ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error");

O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief."). For this reason § 2254(b) provides that state remedies must be exhausted prior to the filing of a federal habeas petition.

The exhaustion requirement is satisfied when state prisoners "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *Boerckel*, 526 U.S. at 845. Once all state courts have denied post-conviction relief and all that remains is federal review, state remedies have been exhausted and no comity interest is served by further tolling the time for filing federal habeas petitions.

"A petition for writ of certiorari to the United States Supreme Court is simply not an application for state review of any kind; it is neither an application for state post-conviction review nor an application for other state collateral review." *Crawley*, 257 F.3d at 400 (quoting *Rhine*, 182 F.3d at 1156). At that time, a certiorari petition implicates the same concerns as a subsequent federal habeas petition because it represents an attack in federal court on the integrity of a state court judgment which, until resolved, defeats the finality of the state court judgment. Section 2244(d)(2) only tolls time when "a *state* prisoner is attempting, *through proper use of state court procedures, to exhaust state court remedies*." 28 U.S.C. § 2244(d)(2) (emphasis added). Time spent pursuing *a federal writ* is not "time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies . . . ." *White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *see also Crawley*, 257 F.3d at 400; *Rhine*, 182 F.3d at 1155-56. This view is supported by the text of AEDPA and the policies of comity, federalism and finality that govern habeas proceedings. Because state court review has been exhausted prior to a petition for

certiorari in this Court, there is no comity interest in tolling the limitations period during this Court's review of the certiorari petition.

Section 2244(d) balances finality and comity

Section 2244(d)(2) fully comports with AEDPA's comity interest, without unduly impacting AEDPA's finality interest, only if the tolling period described in the statute is limited to the time necessary for a state prisoner's pursuit of state remedies. "By tolling the limitation period for the pursuit of state remedies . . . § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180. "At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed applications for State post-conviction or other collateral review.'" *Id.* at 179-80.

Indeed the compromise reached between AEDPA's competing finality and comity interests is evident in § 2244(d). For purposes of finality, the one year limitations period begins to run as soon as a conviction becomes final, i.e., as soon as this Court denies certiorari or the time for filing a petition for certiorari has run, and a prisoner may begin to exhaust his state remedies. For purposes of comity, the limitations period is tolled during such time as state remedies are being exhausted and again for purposes of finality, the period begins to run again as soon as state court remedies have been exhausted. *See Duncan*, 533 U.S. at 179 (purpose of § 2244(d)(2) is to "promote[] the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued."). Tolling the period in which a petition for certiorari could be filed would not further the comity interest as a petition for certiorari in this context represents nothing more than a federal attack on a state conviction. *See Fay*, 372 U.S. at 435-38 ("exhaustion does not

include seeking certiorari from the state court's denial of post-conviction relief"); *County Court of Ulster County, N.Y.*, 442 U.S. at 149 n.7; *see also Rhine*, 182 F.3d at 1156 ("Exhaustion of state remedies, which is a pre-condition to the ability to petition for a writ of habeas corpus, does not include a direct appeal to the United States Supreme Court from the state's denial of post-conviction relief, and neither is a federal court's jurisdiction to entertain a habeas petition affected by whether or not review of the state's denial of post-conviction relief is sought in the Supreme Court."). At the same time, tolling during the certiorari period would hinder AEDPA's finality interest by extending the limitations period.

Petitioner's construction creates a period of time during which a habeas petition *could* be filed, but is not required to be filed. In all other circumstances, the limitations period is tolled only while a federal habeas petition could not properly be filed, i.e., state remedies have not yet been exhausted. Even though the purpose of AEDPA is to require prisoners to pursue promptly any post-conviction remedies, Petitioner's construction of § 2244(d)(2) would permit prisoners to elect not to promptly file their federal habeas petition. This simply contravenes the letter of § 2244(d)(2) and the purposes of AEDPA.

Petitioner also argues that anomalous situations should guide the construction of § 2244(d)(2), Pet. at 26-27; however, such situations are easily cured. In the very rare circumstance noted by Petitioner, where this Court overturns a state court judgment rendered in state post-conviction proceedings after the time for filing a habeas petition has since expired, there is a compelling argument for the application of some form of equitable tolling. In addition to the fact that such circumstances are few and far between,[6] the application of equitable or retroactive tolling cures

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[6] Of the more than 7,000 petitions for certiorari considered in 2004, only one percent of them were granted. The number of such petitions resulting in vacatur of a state grant of post-conviction relief are rarer still. The Supreme Court, 2004 Term: The Statistics, 119 Harv. L. Rev. 415, 425 (2005).

any possible inequity.[7] The fact that in rare circumstances § 2244(d)(2) may operate in a manner that would necessitate application of some equitable remedy does not render the Eleventh Circuit's interpretation of the statute erroneous.

The language used by Congress in § 2244(d)(2) must be construed consistent with the purposes of AEDPA, namely curbing abuse of the writ of habeas corpus. *See* H.R. Rep. No. 104-518, reprinted in 1996 U.S.C.C.A.N. 944. Discarding the construction of § 2244(d)(2) that both accomplishes the purposes of AEDPA and has been adopted by ten of the eleven circuits to have addressed the issue based on the rare circumstance noted above simply goes too far. The correct approach is the construction given to the statute by the majority of the circuits, which appropriately synchronizes the tolling period of § 2244(d)(2) with the exhaustion requirement of § 2254(b)(1)(A).

C. Petitioner's construction of § 2244(d)(2) encourages abuse of the certiorari process.

Petitioner's construction of § 2244(d)(2) provides prisoners an incentive to file frivolous certiorari petitions for the sole purpose of tolling the AEDPA limitations period until such time as the prisoner's certiorari petition is denied. This construction encourages the waste of judicial and state resources on baseless certiorari petitions, particularly given that the costs of filing and responding to the certiorari petitions are shouldered by the state. In the case of capital petitioners, the filing of meritless petitions further abridges the state's interest in imposition of sentences. This Court should not adopt an interpretation of § 2244(d)(2) which would yield such results. Indeed, "[o]ne must question the wisdom . . . of a policy which uses the much scarcer

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[7] The court in *Coleman v. Davis*, 175 F.Supp. 2d 1109 (N.D. Ind. 2001), was presented with such a circumstance and held that the grant of certiorari and vacation of the state court judgment tolled the AEDPA statute of limitations.

resources of the Supreme Court to lighten the burdens of the more numerous district and appellate federal courts." In fact, such a policy "could have a negative impact on comity by diverting the Supreme Court's attention from issues relating to national policy." *Moseley v. Freeman*, 977 F. Supp. 733, 735 (M.D. N.C. 1997). Of course:

> it is conceivable that the Supreme Court might grant a petition for certiorari to review a decision of a state supreme court in a post-conviction relief or other collateral review proceeding and that a petitioner nevertheless in order to avoid the bar of section 2244(d)(1) might file a federal habeas corpus petition that could be pending at the same time that the Supreme Court is considering the petitioner's appeal on the merits. [But] as a practical matter . . . such a situation would [not] be common. In any event, a district court considering the habeas petition in such circumstances would stay the proceedings before it pending the [] Court's disposition of the case.

Miller v. Dragovich, 311 F.3d 574, 580-81 (3d Cir. 2002) (citing *Coleman v. Davis*, 175 F. Supp. 2d 1109, 1110 (N.D. Ind. 2001)) (staying federal habeas proceedings pending final resolution of state post-conviction proceedings remanded to state supreme court by Supreme Court of United States). Further, a 1995 study showed that the median case processing time for all sampled habeas petitions, including those dismissed on procedural matters, was about six months.[8] Cases that were considered on the merits took an average of 477 days to process.[9] Given these

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[8] U. S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions (Sept. 1995), *available at* http://www.ojp.usdoj.gov/bjs/abstract/fhcrcscc.htm.

[9] *Id.*

timeframes, in many cases certiorari will be denied prior to a district court considering a habeas petition on the merits, rendering a stay unnecessary.

II. IGNORANCE OF THE LAW DOES NOT JUSTIFY EQUITABLE TOLLING.

As of November 18, 2002, the date on which the Florida Supreme Court issued its mandate and Petitioner's state postconviction claims were fully exhausted, there was simply no question the § 2244(d)(2) tolling period did not include the time in which a certiorari petition could be filed. The Eleventh Circuit and every other Circuit to have addressed the issue as of that date, including the Sixth Circuit, had so held.[10] *See White v. Klitzkie*, 281 F.3d 920, 924 (9th Cir. 2002); *Smaldone v. Senkowski*, 273 F.3d 133, 137-38 (2d Cir. 2001); *Crawley v. Catoe*, 257 F.3d 395, 401 (4th Cir. 2001); *Stokes v. Dist. Attorney*, 247 F.3d 539 (3d Cir. 2001); *Snow v. Ault*, 238 F.3d 1033, 1035-36 (8th Cir. 2001); *Gutierrez v. Schomig*, 233 F.3d 490, 492 (7th Cir. 2000); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999); *Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999). The Sixth Circuit did not reverse course until it issued its *en banc* decision in *Abela,* seven months after Petitioner actually filed his federal habeas petition, and eleven months after his state remedies were fully exhausted. *Abela v. Martin*, 348 F.3d 164, 172-73 (6th Cir. 2003) (en banc) (Martin, J., writing for majority in 6-5 decision), *cert. denied*, 541 U.S. 1070 (2004). Given the well settled nature of the law, Petitioner's failure to recognize the deadline for filing his petition amounts simply to ignorance. By exercising due diligence, Petitioner could have discovered when the time for filing his federal habeas petition expired.

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[10] The same was true as of October 17, 2002, the date the Florida Supreme Court issued its opinion.

Instead, he asserts, without evidentiary support, only that the attorney representing him in his state post-conviction proceedings misadvised him as to the deadline for filing his habeas petition. Petitioner does not argue in this case that he attempted to ascertain the filing deadline for his habeas petition.

Therefore, to the extent equitable tolling applies to the AEDPA period of limitations, it is not proper in this case.[11] A litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005) (citing *Irwin v. Dep't of Venterans Affairs*, 498 U.S. 89 (1990)). Courts that have applied equitable tolling in AEDPA cases have acknowledged that it should be applied only in "rare and exceptional circumstances." *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *see also Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (equitable tolling is an extraordinary remedy which is typically applied sparingly). As the Fourth Circuit recognized in the AEDPA context, "[a]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). For this reason "any resort to equity must be reserved for those rare instances where--due to circumstances external to the party's own conduct--it would be unconscionable to enforce the limitation period against the party and gross injustice would result. *Id.*

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[11] This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo*, 544 U.S. 408, 417, n.8 (2005).

The extraordinary circumstance asserted by the party seeking equitable tolling must be both "beyond his control and unavoidable even with diligence." *Sandvik v. United States*, 177 F.3d 1269, 1271 (11th Cir. 1999). This Court has permitted equitable tolling in situations "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Young v. United States*, 535 U.S. 43, 50 (2002). This Court has not extended equitable tolling to garden variety claims of excusable neglect. *Irwin*, 498 U.S. at 96 (equitable tolling did not apply where petitioner's lawyer was absent from the office when the EEOC notice was received, and petitioner filed within 30 days of the date he personally received notice); *see also Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 560-61 (6th Cir. 2000) (equitable tolling applies only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control).

Courts have consistently held that ignorance of the law is not a basis for equitable tolling, *see Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991), *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000), and a habeas petitioner's ignorance as to the proper calculation of the limitations period for filing a federal habeas petition does not warrant equitable tolling. *See Felder v. Johnson*, 204 F.3d 168, 171 (5th Cir. 2000) (a pro se prisoner's incarceration before the enactment of the AEDPA and his lack of notice of the statute of limitations "does not present an extraordinary circumstance warranting equitable tolling"); *Fisher v. Johnson*, 174 F.3d 710, 714 (5th Cir. 1999) (ignorance of the law and lack of notice of AEDPA provisions did not merit equitable tolling for pro se petitioner); *Fugate v. Booker*, 321 F. Supp. 2d 857, 860 (E.D. Mich. 2004); *Pearson v. North Carolina*, 130 F. Supp.2d 742, 744 (W.D.N.C. 2001). Given the clear law in the Eleventh Circuit and every other circuit regarding the calculation of the AEDPA limitations period at the

time Petitioner's habeas petition was due, equitable tolling cannot be applied to excuse his lack of diligence. *See Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) (rejecting argument that equitable tolling applied because prisoner's calculation of the tolling period depended on an interpretation of a novel legal issue and there was an absence of "clear law").

Petitioner's lack of due diligence is likewise not excused by his unsupported allegation that he is "nearly incompetent." Petitioner has never been found to be legally incompetent and by his own assertions he was found to have an IQ in the average to low-average range.[12] Even in cases where a litigant has actually been found to be incompetent, equitable tolling only applies if the lack of competency contributed to the missed deadline. *Bilbrey v. Douglas*, 124 Fed. Appx. 971, 973 (6th Cir. 2005) (equitable tolling did not apply because petitioner "failed to establish a causal connection between her mental condition and her ability to file a timely petition"); *Green v. Hinsley*, 116 Fed. Appx. 749, 751 (7th Cir. 2004) (equitable tolling did not apply because petitioner failed to submit evidence of how his low IQ would render him incompetent or prevent him from timely filing his petition); *Fisher v. Gibson*, 262 F.3d 1135, 1143-45 (10th Cir. 2001) (equitable tolling not justified by petitioner's mere allegations of mental incompetence). In this case Petitioner demonstrated his ability to file pleadings by filing *pro se* his initial petition for federal habeas corpus and a motion for appointment of counsel. Petitioner's low average IQ cannot be an extraordinary circumstance warranting equitable tolling in this case. *See United States. v. Sosa*, 364 F.3d 507, 512-13 (4th Cir. 2004) (equitable tolling not justified despite alleged language difficulties and mental disorders because ignorance of

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[12] Petitioner asserts that he has an IQ of 81. J.A. 120. "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Atkins v. Virginia*, 536 U.S. 304, 309 (2002) (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 41, 42-43 (4th ed. 2000)).

the law was not a basis for equitable tolling, and the record refutes language difficulties).

III. DEFICIENCIES IN THE APPOINTMENT OR CONDUCT OF POSTCONVICTION COUNSEL DO NOT JUSTIFY APPLICATION OF EQUITABLE TOLLING

Petitioner's claims of attorney error in the habeas process are essentially claims of ineffective assistance of post-conviction counsel, claims not cognizable in a federal habeas proceeding. Section 2254 expressly provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." 28 U.S.C. § 2254(i). Given the fact that such claims are not cognizable in federal habeas proceedings, claims of ineffectiveness or incompetence of post-conviction counsel cannot constitute an extraordinary circumstance warranting equitable tolling of the AEDPA limitations period.

Moreover, courts have held routinely that attorney negligence, even in the AEDPA context, does not justify equitable tolling, *See Sandvik*, 177 F.3d at 1270-72 (refusing to apply equitable tolling where late filing was caused by attorney's use of ordinary mail to send petition less than a week before it was due). Courts have also consistently rejected equitable tolling claims based on an attorney's miscalculation or mistaken representations of the limitations period.[13] The Fourth Circuit

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[13] *Rouse v. Lee*, 339 F.3d 238, 248 (4th Cir. 2003) (errors of counsel in misinterpreting statutory filing requirements was neither extraordinary nor external to Rouse's own conduct); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) ("Counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period."); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2d Cir. 2001) ("Attorney error [is] inadequate

rejected an equitable tolling claim virtually identical to the one at hand. In *Harris v. Hutchinson*, 209 F.3d 325 (4th Cir. 2000), the petitioner claimed he relied on his attorney's misinterpretation of the § 2244(d)(1) limitations period in filing his untimely habeas petition. The Court held "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond the party's control where equity should step in to give the party the benefit of his erroneous understanding." *Id.* at 331. Likewise, in refusing to apply equitable tolling to a petition for collateral review filed one day late by prisoner's counsel due to incapacity, the Seventh Circuit held that "petitioners bear ultimate responsibility for their filings, even if that means preparing duplicative petitions." *Modrowski v. Mote*, 322 F.3d 965, 968 (7th Cir. 2003) (quoting *Johnson v. McCaughtry*, 265 F.3d 559, 566 (7th Cir. 2001)).

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to create the 'extraordinary' circumstances equitable tolling requires."); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Geraci v. Senkowski*, 211 F.3d 6, 9 (2d Cir. 2000) (attorney's misunderstanding of the period for which a claim remained "pending" did not warrant equitable tolling); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000) (holding that counsel's confusion about AEDPA's statute of limitations does not justify equitable tolling); *Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000) ("Any miscalculation or misinterpretation by Steed's attorney in interpreting the plain language of the statute does not constitute an extraordinary circumstance sufficient to warrant equitable tolling."); *Taliani v. Chrans*, 189 F.3d 597, 597-98 (7th Cir. 1999) (equitable tolling not proper where prisoner seeking federal habeas corpus relief claimed that his attorney miscalculated § 2244(d)(1) limitations period due to inadequate research); *see also Merritt v. Blaine*, 326 F.3d 157, 169 (3d Cir. 2003) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assistance of counsel generally does not warrant equitable tolling."); *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir. 2001) ("attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling"); *Sandvik v. United States*, 177 F.3d 1269, 1270 (11th Cir. 1999) ("mere attorney negligence . . . is not a basis for equitable tolling").

Petitioners, "whether in prison or not, must vigilantly oversee the actions of their attorneys and, if necessary, take matters into their own hands." *Id.* Petitioner failed to exercise due diligence and oversee the actions of his attorney.

The general principle underlying attorney-client relationships is that "lawyers are agents. Their acts (good and bad alike) are attributed to the clients they represent." *Johnson v. McBride*, 381 F.3d 587 589 (7th Cir. 2004) (citing *Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 396-97 (1993)). The Sixth Amendment creates an exception to this principle for criminal trials and permits the filing of ineffective assistance of counsel claims. However, "neither the Sixth Amendment nor federal law guarantees effective assistance of counsel for collateral proceedings, not even in a capital case." *Johnson*, 381 F.3d at 589 (citing *Coleman v. Thompson*, 501 U.S. 722, 752-54 (1991)); *see also Murray v. Carrier*, 477 U.S. 478, 488 (1986) ("So long as a defendant is represented by counsel whose performance is not constitutionally ineffective . . . we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."). Because Petitioner's post-conviction counsel could, *per se*, not have been constitutionally ineffective, the acts of Petitioner's attorney are attributable to Petitioner himself, and cannot be a basis for equitable tolling.[14]

Further, there is no right to counsel in post-conviction relief proceedings, even where a defendant has been sentenced to death. *See Coleman*, 501 U.S. at 756-57 (no right to counsel in federal habeas proceedings, so lack of an attorney will not

[14] Petitioner has presented no evidence that state registry counsel did in fact misadvise him of the deadline for filing his habeas petition. If this court finds that equitable tolling could apply under the alleged facts of this case, an evidentiary hearing must be held to determine whether there actually is a factual basis for Petitioner's assertion that counsel advised him incorrectly and that counsel's misadvice was the cause of his late filing.

excuse an untimely habeas application); *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), applies to inmates under sentence of death as well as to other inmates). Thus, if Florida did not provide for the appointment of counsel to Petitioner, he would have no federal claim. As this Court held in *Giarratano*:

> State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case are, we think, sufficient to assure the reliability of the process by which the death penalty is imposed. We therefore decline to read either the Eighth Amendment or the Due Process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases.

492 U.S. at 10; *see also Hill v. Jones*, 81 F.3d 1015, 1025 (11th Cir. 1996) (holding there is no constitutional right to post-conviction counsel in the Eleventh Circuit and that ineffective assistance of post-conviction counsel is not a cognizable claim).

All that is required in post-conviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process. *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (furnishing access to adequate law libraries or adequate assistance from persons trained in the law may fulfill a State's obligation to provide prisoners' right of access to courts), *disapproved in part by Lewis v. Casey*, 518 U.S. 343 (1996) (*Bounds* disapproved to the extent it can be read to require a state to enable prisoners to discover grievances and litigate effectively once in court; a state need only provide inmates with tools necessary to attack sentences directly or collaterally). Because there is no constitutional right to post-

conviction counsel, Petitioner's argument that he is entitled to equitable tolling because he was not appointed counsel "soon enough" is without merit.

In any event, while Petitioner argues that equitable tolling is warranted because he did not receive appointed counsel early enough in the state post-conviction proceeding process, this appointment is irrelevant as it did not cause Petitioner to file his habeas petition late. The disorganization Petitioner alleges existed within Florida's registry counsel program four years prior to the time Petitioner's habeas petition was due is also irrelevant as it did not cause Petitioner to untimely file his petition. Petitioner's state post-conviction motion was timely filed, and one day remained on the AEDPA limitations clock. Once the Florida Supreme Court issued its opinion affirming the denial of post-conviction relief, Petitioner should have known, through the exercise of due diligence, that the AEDPA limitations clock would begin to run once the Florida Supreme Court issued its mandate.[15] The mandate in this case was not issued until thirty days after the date of the decision. Thus, Petitioner had not one day, but a full thirty-one days to file his habeas petition. Contrary to Petitioner's allegations that timely filing of his habeas petition was "practically impossible," this thirty-one day period was more than ample time for Petitioner to file his habeas petition, particularly given that his petition raised the same claims presented in his state proceedings,[16] and the

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[15] *See Nyland v. Moore*, 216 F.3d 1264, 1267 (11th Cir. 2000) (under Florida law, appellate order "is pending" until the mandate issues).

[16] Although Lawrence's counsel filed an amended habeas petition which raised different claims, an amended habeas petition, does not relate back (and escape AEDPA's one-year time limit) when it asserts a ground for relief supported by facts that differ in both time and type from those set forth in the original pleading. *Mayle*, 125 S. Ct. at 2566. The claims raised in Petitioner's state proceedings are summarized in *Lawrence v. State*, 698 So. 2d 1219, 1221-22 (Fla. 1997); and *Lawrence v. State*, 831 So. 2d 121, 126 (Fla. 2002).

prisoner mailbox rule applies.[17] Had Petitioner exercised due diligence, he could easily have timely filed his habeas petition.

Finally, accepting Petitioner's argument simply punishes states for appointing counsel. Notwithstanding the fact that there is no constitutional right to post-conviction counsel, Florida has taken the extraordinary step of appointing post-conviction counsel and becoming the only state to expressly require state courts to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation." § 21.11(12), Fla. Stat.; *see also* Celestine Richards McConville, *Protecting the Right to Effective Assistance of Capital Postconviction Counsel: The Scope of the Constitutional Obligation to Monitor Counsel Performance*, 66 U. Pitt. L. Rev. 521, 526-27 (2005). In addition, Florida requires registry counsel to meet minimum standards of experience and competence and limits their workload to ensure sufficient time is dedicated to each client. § 27.710 and § 27.711(9), Fla. Stats. Petitioner argues that Florida and other states who choose to provide counsel for state post-conviction proceedings and establish minimum standards for counsel should be punished for doing so, as any mistakes made by appointed counsel should be held against the state. Such a result would ensure state reluctance to appoint counsel or establish minimum standards.

Given that attorney negligence does not entitle a litigant to equitable tolling, the sole question that remains is whether an alleged mistake by *state appointed* counsel entitles litigants to equitable tolling. For the reasons stated above it does not. Further, no distinction is drawn between appointed counsel and private counsel in the ineffective assistance of post-conviction counsel context. In either case a litigant bears the risk of his counsel's mistakes and no ineffective assistance claim can be

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[17] Prisoner petitions are deemed filed when they are placed into the prison mail system. *Adams v. United States*, 173 F.3d 1339, 1341 (11th Cir. 1999). Petitioner merely had to place his petition in the prison mail system on November 19, 2002.

raised. Given the lack of distinction between appointed and private counsel in the ineffective assistance of counsel context, there is no reason to distinguish between appointed counsel and private counsel for equitable tolling purposes.

CONCLUSION

Based on all of the foregoing, Respondent respectfully requests that the decision of the Eleventh Circuit be affirmed.

RESPECTFULLY SUBMITTED,

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